Commonwealth v. *Jones*, 10 Bush. (Ky.) 725; *Ex parte Lange*, 18 Wall. (U. S.) 163, 168, 169. But *cf. State* v. *Jones*, 82 N. C. 685.

EMINENT DOMAIN — COMPENSATION — WATERWAY CONSTRUCTED BY CITY THROUGH RAILWAY'S RIGHT OF WAY NECESSITATING STRUCTURAL CHANGES. — A city constructed a canal, with walks on either side, through the right of way of a railroad, in order to join certain lakes used for recreation purposes by its inhabitants. This made it necessary for the railroad to build a bridge. *Held*, that the railroad is entitled to compensation for the value of the land taken but not for the cost of building and maintaining the bridge. *Chicago, M. & St. P. Ry. Co.* v. *City of Minneapolis*, 34 Sup. Ct. 400.

For a discussion of the distinction between taking property under the eminent domain power and under the police power, see NOTES, p. 664.

EQUITY — JURISDICTION — RIGHT TO ENJOIN A THREATENED CRIMINAL PROSECUTION AGAINST A THIRD PARTY. — A statute forbade the shipment by any one, or the receipt for shipment by carriers, of unpasteurized cream to be carried more than sixty-five miles. The business of the complainant, a dairy company, which depended on the receipt of cream from farmers more than sixty-five miles distant, was thereby being ruined because the farmers and railroad company were afraid to ship. Plaintiff, on the ground that the statute was unconstitutional, sought to enjoin the railroad from refusing to accept goods consigned to him, and also to restrain the Attorney-General from prosecuting for breach of the statute. *Held*, that equity will not enjoin a criminal proceeding directed against a party other than the petitioner, nor will the railroad company be enjoined from refusing to accept goods offered. *Milton Dairy Co.* v. *Great Northern Ry. Co.*, 144 N. W. 764 (Minn.).

Whether the court should have refused to grant an injunction against the railroad is not entirely free from doubt. It is usually held that a railroad cannot justify a refusal to serve by pleading an unconstitutional statute. *Southern Express Co.* v. *Rose*, 124 Ga. 581, 53 S. E. 185. It may be contended therefore that the railroad, in signifying its unwillingness to receive shipments, was threatening torts involving irreparable injury to the plaintiff, and should be enjoined. However that may be, the court squarely held that, whether or no the statute was constitutional, it would not restrain the Attorney-General from prosecuting the shippers and the railroad unless the injunction was demanded by the persons threatened with prosecution. For a discussion of whether irreparable damage to one's business relations gives a right to enjoin the prosecution of someone else under an unconstitutional statute, see NOTES, p. 668.

EVIDENCE — GENERAL PRINCIPLES AND RULES OF EXCLUSION — REPAIRS AFTER INJURY AS PROOF OF CAUSATION AND POSSIBILITY OF PREVENTION. — The defendant operated an irrigation canal across the plaintiff's land. To show that his orchard was injured by an enlargement of the canal, and that the seepage could have been prevented by cementing the sides, the plaintiff offered evidence of subsequent repairs which had stopped the damage. *Held*, that the evidence is admissible. *Jensen* v. *Davis and Weber, etc. Co.*, 137 Pac. 635 (Utah).

It is quite well settled that evidence of subsequent repairs cannot be used to show negligence. It is irrelevant, inasmuch as taking precautions for the future is not an admission of culpability in the past; and its admission is against public policy in that it would deter owners from remedying defects. *Aldrich* v. *Concord & M. R. R.*, 67 N. H. 250, 29 Atl. 408. In the principal case the evidence is relevant on both the issues for which it was offered. Proof that the damage began and ended with the uncemented condition of the canal is convincing both as to causation and as to whether there was a practicable

method of prevention. Of course, the latter lays the foundation for establishing negligence, but it does not in itself indicate that the injury could have been foreseen. As to public policy, there is still some objection. But subsequent repairs are admitted to show ownership or control. *O'Malley* v. *Twenty-Five Associates*, 170 Mass. 471, 49 N. E. 641. And also to rebut testimony descriptive of the premises before the injury. *McRickard* v. *Flint*, 114 N. Y. 222, 21 N. E. 153. The objection certainly has less force here than when applied to negligence, and it seems proper to confine it to that situation. In accord with the principal case on causation, see *Kuhn* v. *Illinois Central Ry. Co.*, 111 Ill. App. 323; *Texas & N. O. R. Co.* v. *Anderson*, 61 S. W. 424 (Tex. Civ. App.). In accord with it on the possibility of prevention, see *St. Louis, etc. Ry. Co.* v. *Johnston*, 78 Tex. 536, 15 S. W. 104; *Lind* v. *Uniform Stave and Package Co.*, 140 Wis. 183, 189, 120 N. W. 839, 842.

EVIDENCE — HEARSAY: IN GENERAL — ADMISSIBILITY OF TELEPHONE CONVERSATIONS — RES GESTA. — In an action on an insurance policy the issue was whether the company had received notice of an assignment to the plaintiff. The witness testified that he had seen the policy-holder go to a telephone, had heard him ask for the company and give the notice, and that immediately thereafter the policy-holder had told him that the company was willing to make the transfer. *Held*, that the evidence is admissible. *Northern Assurance Co.* v. *Morrison*, 162 S. W. 411 (Tex. Civ. App.).

The difficulties of the principal case are distinct from the line of authority which permits the person who did the talking to testify as to what he had heard over the telephone provided he recognized the voice. *Shawyer* v. *Chamberlain*, 113 Ia. 742, 84 N. W. 661. See 20 HARV. L. REV. 156. Here both aspects of the testimony seem to violate the hearsay rule. As to the alleged notice, it is hearsay because the witness has no personal knowledge to indicate what individual, if any, is at the other end. It might be accepted as a matter of common knowledge that hearing the call placed practically insures this identity were it not for the fact that the listener has no means of assuring himself that the user of the telephone is not either carrying on a wholly fictitious conversation or talking to an accomplice. But when the lack of personal knowledge has been supplied by extrinsic evidence that a real conversation took place, the evidence becomes admissible. Authority on the point is scant, but it recognizes this distinction. *Miles* v. *Andrews*, 153 Ill. 262, 38 N. E. 644; *McCarthy* v. *Peach*, 186 Mass. 67, 70 N. E. 1029. It also appears unsound for the court to admit the subsequent declaration as part of the *res gesta*, since it is neither contemporaneous nor properly explanatory. Its only force is to indicate what the other party said, and in that respect it is pure narration. *Waldele* v. *New York Central & H. R. R. Co.*, 95 N. Y. 274. See THAYER, LEGAL ESSAYS, 207.

EVIDENCE — JUDICIAL NOTICE — REPORTS TO RAILROAD COMMISSION. — A finding by a railroad commission that certain rates were unreasonable was based on facts contained in certain reports filed, pursuant to statute, by other railroad companies with the commission itself, and with the state board of assessments. These reports had not been introduced in evidence, but were spread on public records. *Held*, that the reports were proper subjects of judicial notice. *Chicago & N. W. R. Co.* v. *Railroad Commission*, 145 N. W. 216 (Wis.).

Cases of judicial notice of census returns and of legislative journals seem most closely analogous. *Chicago & A. R. Co.* v. *Baldridge*, 177 Ill. 229, 52 N. E. 263; *Dane County* v. *Reindahl*, 104 Wis. 302, 80 N. W. 438. But by the better view even the latter are merely admissible evidence. *Grob* v. *Cushman*, 45 Ill. 119. See WIGMORE, EVIDENCE, § 2577. The propriety of judicial notice, by a strictly judicial tribunal, of the contents of records like those in the principal